

The Honorable Barbara J. Rothstein

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

NORTHWEST ENVIRONMENTAL
ADVOCATES,

Plaintiff,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, *et al.*

Defendants,

and,

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Defendant-Intervenor.

Case No. 2:19-cv-01537-BJR

INTERIM CONSENT DECREE

WHEREAS, in this lawsuit Northwest Environmental Advocates (NWEA) alleges that the U.S. Environmental Protection Agency (EPA) has violated mandatory duties related to Washington State's total maximum daily load (TMDL) program under Section 303(d) of the

Clean Water Act, 33 U.S.C. § 1313(d), and taken actions in violation of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A);

WHEREAS, on August 21, 2020, the Court granted Washington State Department of Ecology's (Ecology) motion to intervene in this litigation;

WHEREAS, EPA, NWEA, and Ecology (the Parties) enter this Interim Consent Decree in an effort to resolve the claims in this lawsuit without the need for contested litigation by setting out a schedule by which the State will establish certain TMDLs for impaired waters on the State's Section 303(d) list through the completion of the Interim Consent Decree;

WHEREAS, the Parties have entered a separate Interim Settlement Agreement establishing a process to develop recommendations for the establishment of TMDLs by Washington, which Interim Settlement Agreement will become effective once the parties to that agreement execute it and the Court enters this Interim Consent Decree;

WHEREAS, the Parties anticipate entering a final settlement after the work contemplated by the Interim Settlement Agreement has been completed;

NOW, THEREFORE, it is hereby ordered as follows:

I. TMDL Submissions and Bar on Constructive Submission Litigation

1. Ecology shall submit to EPA the completed TMDLs specified in Appendix A attached hereto according to the schedule set out in that Appendix.
2. NWEA shall not, before 34 months following entry of this Interim Consent Decree, file a new lawsuit for any claim alleging the constructive submission of no TMDL for any Washington water quality limited segment, nor shall NWEA amend any current or future lawsuit to add such a claim during that time. Nor shall NWEA, before 32 months following entry of this Interim Consent Decree, issue notice of its intent to sue EPA for any such

1 claim. However, if NWEA dismisses constructive submission claims in *Northwest*
2 *Environmental Advocates v. U.S. Environmental Protection Agency*, Case No. 2:19-cv-
3 02079-BJR (W.D. Wash.), refiling such claims will not be considered a new lawsuit for
4 purposes of this Interim Consent Decree. Nothing in this Interim Consent Decree shall be
5 construed to limit (a) EPA's rights and arguments in defending against this or any other
6 constructive submission suit or claim that NWEA or any other party may file, or (b) any
7 rights NWEA may have to file a lawsuit and claim against EPA under Section 505 of the
8 Clean Water Act, 33 U.S.C. § 1365, or Administrative Procedure Act, that seeks to compel
9 the Agency to approve or disapprove TMDLs submitted by the State under Paragraph 1, or
10 any defenses EPA may have to any such lawsuit and claim.
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12 **II. Dispute Resolution**

- 13 3. In the event of a disagreement between the Parties concerning the interpretation of any
14 provision of this Interim Consent Decree or the performance thereof, the dissatisfied Party
15 shall provide the other Parties with written notice of the dispute and a request for
16 negotiations. The Parties agree to negotiate in good faith regarding any disagreement. If the
17 Parties cannot resolve such disagreement within 30 days after receipt of the notice by the
18 other Parties or within such other period of time to which the Parties mutually agree, then
19 any Party may move the Court to resolve the dispute. In accordance with the Federal Rules
20 of Civil Procedure and the Local Rules for the Western District of Washington, the non-
21 moving Parties shall have the opportunity to respond to such motion, and any Party may
22 seek oral argument before the Court.
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1 **III. Modifications and Extensions**

- 2 4. Any term set forth in this Interim Consent Decree, including any deadlines, may be
3 modified by written agreement of the Parties and with notice to the Court.
- 4 5. If any Party seeks to modify the terms of this Interim Consent Decree pursuant to Paragraph
5 4, above, that Party shall provide the other Parties with written notice of the proposed
6 modification and a request for negotiations. The Parties agree to negotiate in good faith
7 regarding any proposed modification of this Interim Consent Decree. If the Parties agree to
8 a proposed modification, the Parties shall jointly notify the Court of the modification. If the
9 Parties cannot reach agreement regarding the proposed modification within 30 days after
10 receipt of the notice of the proposed modification by the Party seeking modification, or
11 within such other time to which the Parties mutually agree, then any Party may move the
12 Court for such modification, with the exception of the provisions in Paragraph 2. Pursuant
13 to the Federal Rules of Civil Procedure and the Local Rules for the Western District of
14 Washington, the non-moving Parties shall have the opportunity to respond to such motion,
15 and any Party may seek oral argument before the Court.
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18 **IV. Effective Date**

- 19 6. This Interim Consent Decree shall become effective upon the date of its entry by the Court.
20 If for any reason the Court does not enter this Interim Consent Decree, the obligations set
21 forth herein are null and void.
22

23 **V. Notice and Correspondence**

- 24 7. Any notice, including correspondence, required or made with respect to this Interim
25 Consent Decree, shall be in writing and shall be effective upon receipt. For any matter
26 relating to this Interim Consent Decree, the contact persons are:

For EPA:

David Kaplan
david.kaplan@usdoj.gov

Gus Maxwell
gustavus.maxwell@usdoj.gov

Elise O'Dea
odea.elise@epa.gov

Alex Fidis
fidis.alexander@epa.gov

For NWEA:

James Saul
jsaul@lclark.edu

Andrew Hawley
hawley@westernlaw.org

For Ecology:

Ron Lavigne
ronald.lavigne@atg.wa.gov

Upon written notice to the other Parties, any Party may designate a successor contact person for any matter relating to this Interim Consent Decree.

VI. Unforeseen Circumstances

8. The possibility exists that circumstances outside the reasonable control of the Parties could delay compliance with the deadlines specified in this Interim Consent Decree. Such circumstances include, but are not limited to, a lapse in State or federal government funding, an environmental disaster that would require EPA or State employees to divert resources away from this project, and the unexpected need for additional, necessary information to issue a particular TMDL. Should a delay occur due to circumstances outside the reasonable control of the Parties, any resulting failure to meet the deadlines set forth herein shall not constitute a failure to comply with the terms of this Interim Consent Decree, and any deadlines affected by that delay shall be extended one day for each day of the delay. Any Party that seeks to invoke this term of the Interim Consent Decree shall

provide the other Parties with notice and an explanation of their basis for invoking this paragraph as soon as is reasonably possible. The other Parties may challenge the invocation of this term of the Interim Consent Decree under the dispute resolution terms of Paragraph 3 of this Interim Consent Decree, and the Party seeking the invocation of this term shall bear the burden of justifying its activation.

VII. Mutual Drafting and Construction

9. This Interim Consent Decree is the product of good faith, arm's length negotiations by all Parties, with each contributing to its drafting. Accordingly, the Parties agree that any and all rules of construction to the effect that ambiguity is construed against the drafting party shall be inapplicable in any dispute concerning the terms, meaning, or interpretation of this Interim Consent Decree.

VIII. Scope of Interim Consent Decree

10. Nothing in the terms of this Interim Consent Decree shall be construed to limit or modify the discretion accorded EPA or Ecology under the Clean Water Act or by general principles of administrative law. Nothing in this Interim Consent Decree shall be construed to make any other person or entity not executing this Interim Consent Decree a third-party beneficiary thereof.

11. The separate Interim Settlement Agreement is not incorporated into this Interim Consent Decree and that Interim Settlement Agreement is not an enforceable court order.

12. The Parties agree that this Interim Consent Decree is fair, reasonable, and in the public interest. This Interim Consent Decree is not and shall not constitute or be construed as an admission by EPA or Ecology of any factual or legal allegations made by NWEA, an admission of liability, or an admission of any other kind. Neither this Interim Consent Decree nor any Party's performance thereunder is intended to have, and shall not be deemed to have, any evidentiary or precedential effect in any other judicial or administrative action involving claims asserted against EPA or Ecology.

IX. Counterparts

13. This Interim Consent Decree may be executed in any number of counterpart originals, each of which shall be deemed to constitute an original agreement, and all of which shall constitute one agreement. The execution of one counterpart by any Party shall have the same force and effect as if that Party had signed all other counterparts.

X. Applicable Law

14. This Interim Consent Decree shall be governed by and construed under the laws of the United States.

XI. Compliance With Other Laws


15. No provision in this Interim Consent Decree shall be interpreted as or constitute a commitment or requirement that EPA take action in contravention of the Administrative Procedure Act, 5 U.S.C. §§ 551–559, 701–706; the Clean Water Act, 33 U.S.C. §§ 1251–1387; the Anti-Deficiency Act, 31 U.S.C. § 1341; or any other law or regulation, either substantive or procedural.

XII. Representative Authority

16. Each person signing this Interim Consent Decree certifies that he or she has been duly authorized to enter into and execute the terms and conditions of this Interim Consent Decree by the Party on whose behalf it is indicated that the person is signing, and to legally bind such Party to this Interim Consent Decree. By signing below, all of the Parties consent to the entry of this Interim Consent Decree.

1 TODD KIM

2 Assistant Attorney General

3 

DATED: 12/18/23

4 DAVID KAPLAN

5 GUS MAXWELL

6 United States Department of Justice

7 Environment & Natural Resources Division

8 Environmental Defense Section

9 (202) 514-0997

10 david.kaplan@usdoj.gov

11 (202) 598-3307

12 gustavus.maxwell@usdoj.gov

13 *Attorneys for Defendants*

14 

DATED: 12/5/23

15 JAMES N. SAUL (OSB #1067236)

16 (Admitted *Pro hac vice*)

17 Earthrise Law Center

18 Lewis & Clark Law School

19 10015 SW Terwilliger Blvd.

20 Portland, OR 97219

21 (503) 768-6929

22 jsaul@lclark.edu

23 ANDREW HAWLEY (WSBA # 53052)

24 Western Environmental Law Center

25 1402 3rd Ave., Suite 1022

26 Seattle, WA 98101

(206) 487-7250

hawley@westernlaw.org

Attorneys for Plaintiff Northwest

Environmental Advocates

ROBERT W. FERGUSON

Attorney General



DATED: 12/7/23

RONALD L. LAVIGNE, WSBA #18550

INTERIM CONSENT

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DECREE

Case No. 2:19-cv-01537-BJR

1 Senior Counsel
2 Office of the Attorney General
3 Ecology Division
4 P.O. Box 40117
5 Olympia, WA 98504-0117
6 360-586-6751
7 ronald.lavigne@atg.wa.gov

8 *Attorneys for Defendant-Intervenor*
9 *State of Washington, Department of Ecology*

10 Respectfully submitted on December 18, 2023.

11 IT IS SO ORDERED, this 21st day of December 2023.

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15 Barbara Jacobs Rothstein
16 United States District Judge
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APPENDIX A
Interim TMDL Schedule for the State of Washington

Waterbody / WQLS	Parameter(s)	Date for Ecology's Submission to EPA
Soos Creek (Listings 70150, 70161, 70162, 70181, 70193, 70186, & 70187)	Fine Sediment	December 2025
Drayton Harbor	Bacteria	December 2025